SUPREME COURT, U.S.
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No. 75-1225

In the Supreme Court of the United States

OCTOBER TERM, 1975

LOUIS A. MARKERT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, Louis A. Markert, prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Seventh Circuit reversing an order of suppression of his grand jury testimony and subsequent statements to government attorneys and investigators; all pursuant to grand jury subpoena, which testimony and statements were in response to inquiries by the federal executive or grand jury, and related directly to

petitioner's acts as a legislator and member of the Illinois General Assembly, all relating to the State of Illinois legislative process and function.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, in *United States* v. *Craig,* et al., No. 74 Cr 877 is not officially reported but is printed in the Appendix to this Petition (App. A, pp. 1-10). The opinion of the United States Court of Appeals for the Seventh Circuit reversing the Order of Suppression under the same title, No. 75-1592 of that Court was entered on January 5, 1976 and is not yet officially reported but is printed in the Appendix hereto (App. B, pp. 11-33).

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was filed on January 5, 1976 (App. B). A timely Petition for Rehearing was denied on January 27, 1976 (App. C, p. 34). This Petition is filed within 30 days of that date. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).[1]

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[1] A Petition for Rehearing and a Suggestion for Rehearing En Banc is due to be filed by the government on or before March 10, 1976. This delay is a result of two motions for extension of time, both *granted*, to the government. However, a motion made to the Court of Appeals to recall this denial of the Petition for Rehearing, pending the determination of the Government's Petition for Rehearing, in order that all matters may be disposed of at once, has been *denied*.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's decision in *United States* v. *Brewster* (408 U.S. 501) holding that "The immunities of the Speech and Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators (408 U.S. at 507) precludes any contention that such a privilege may be waived by an individual legislator.

2. Whether a recognized Speech or Debate privilege forecloses judicial or executive inquiry into legislative activity without reference to waiver by an individual member of the legislative body on the basis that the privilege is historically institutional. (*United States* v. *Johnson,* 383 U.S. 169)

3. Whether this Court, in footnote 13 of its decision in *Gravel* v. *United States,* 408 U.S. 606 (622), which states that a Senator's "aide's claim of privilege can be repudiated and thus waived by the Senator", a mere refusal to invoke the Fifth Amendment by the State legislator which the Seventh Circuit has equated into a waiver of the legislative right against inquiry expressly stating in its opinion (App. 26) that "we need not find a knowing and intelligent forfeiture of the right".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 6, Clause 1, United States Constitution

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Fel-

ony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Article IV, Section 12, Illinois Constitution of 1970

Except in cases of treason, felony or breach of peace, a member shall be privileged from arrest going to, during, and returning from sessions of the General Assembly. A member shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house. These immunities shall apply to committee and legislative commission proceedings.

STATEMENT OF THE CASE

This case originated by the filing of an indictment in two counts against petitioner, a former member of the Illinois General Assembly and two present members, (plus an unindicted co-conspirator also a legislator) under the provisions of Title 18 U.S.C. § 1951, and § 1341.

Under the terms of the Indictment, at all times pertinent thereto this petitioner was a duly elected member of the House of Representatives of the State of Illinois (Para. 1) and of the Seventy-Eighth General Assembly, "entrusted and vested by reason of his office with the legislative power of the State of Illinois." (Para. 2)

It is, further, alleged in Count I that he, and three others, did "conspire to use the power and authority vested in them by reason of their office as members of the House of Representatives to unlawfully obtain and cause to be obtained property. . . ." (Para. 5)

Paragraph 3 of Count I describes the alleged victims of the scheme as being defrauded of this defendant's

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"loyal, faithful and honest services in their official positions as members of the House of Representatives. . ." (sub-para. a), and of the alleged victims' right to honest and lawful conduct of the legislative business of the State. (sub-para. b)

The scheme as alleged in Paragraphs 4 through 8, describes the introduction of House Bill 2025; the postponement of consideration of that Bill; conferring with a registered lobbyist about paying money for the stopping of the passage of the Bill, and soliciting the same, and causing the tabling of said Bill.

Together with moving (ultimately unsuccessfully) to dismiss the indictment so violative of the Speech or Debate Clause of the United States Constitution (Art. I, §6) and of the State of Illinois (Art. IV, §12), this petitioner also moved to suppress statements he made to inquiries put to him by the office of the United States Attorney before the Grand Jury, pursuant to Grand Jury subpoena and less formally (but still with the understanding that statements made were under the command of the subpoena) to such attorneys and federal agents.

On each occasion, petitioner was clearly advised of his privilege against self-incrimination under the Fifth Amendment. He did not invoke that right. When he moved for suppression, he did so on the basis that he had no knowledge of whatever rights he might have in his legislative capacity concerning his legislative functions. His counsel admitted he was not advised, because counsel herself was not aware, and the government admitted it only informed him of his fifth amendment rights. (Common Law Record, Doc. 56).

Without hearing on whether, in testifying and giving statements, petitioner had voluntarily relinquished any

known right, the trial judge found no right or capability in petitioner to waive.

> "The Court concludes, upon consideration of the relevant authorities, that it would defeat the purpose of the Illinois Speech or Debate Clause if an individual legislator could waive a protection which was personal to him. It is clear, in the opinion of this Court, based on the plain wording of the Illinois Speech or Debate Clause and on the language of Supreme Court opinions, that the privilege operates as a complete bar to inquiry into legislative activities. The Court holds that the privilege is not personal to a legislator and may not be waived. The Speech or Debate Clause was designed to protect the legislative process and render it immune from intimidation. The fact that a legislator benefits from its protection does not alter the nature of the privilege.
>
> "The judicial or executive branches of government may not avoid this constitutional prohibition by the fortuitous expedient of obtaining the willing cooperation of a legislator, who chooses to volunteer information, thereby creating an inhibiting effect on the legislative activities of other members of the legislature. While there is nothing, as a practical matter, which can prevent a legislator from volunteering information on protected activities, the Speech or Debate Clause prohibits this Court from listening." (App. 5-6)

Accordingly, the lower court suppressed certain defined testimony and statements made by petitioner. (App. 8-10)

From that suppression order, the United States appealed, and the Court of Appeals reversed. (App. B)

While the District Court found the protection of the Illinois Constitution to insulate the petitioner, the Court of Appeals for the Seventh Circuit found a federal com-

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mon law immunity,[2] and also found that immunity subject to waiver, and that it had been waived.

> "Markert contends that the facts of this case indicate that the decision to testify was not freely made. The heart of his argument is that he was not informed of his right to claim a speech or debate testimonial privilege either by the Government or by his own counsel. However, the Supreme Court has never held that the failure to inform the defendant of a privilege unrelated to trial fairness mandates a finding that the decision was not voluntary. *Schneckloth* v. *Bustamonte*, *supra*, 412 U.S. at 227; accord, *Byrd* v. *Lane*, 398 F.2d 750, 755 (7th Cir. 1968), certiorari denied, 398 U.S. 1020. When he appeared before the grand jury, he gave potentially damaging testimony rather than relying on his privilege against self-incrimination, of which he had been informed. Because he made a conscious choice to testify, he waived the instant privilege. Although subpoenaed before the grand jury, Markert was not compelled to testify in violation of any of his rights. See *United States* v. *Calandra*, 414 U.S. 338, 346; *Kastigar* v. *United States*, 406 U.S. 441, 448. Because he was a state legislator, knowledgeable in the workings of the Government and represented by competent counsel, his election to testify waived his Speech or Debate clause privilege." (App. 27)

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[2] For the purpose of this petition, it makes no difference to the petitioner whether the right was secured by the State Constitution or was secured by the federal common law. One way or the other, both courts have secured a right to the petitioner, and it is not necessary at this point to address ourselves to federal-state balance or imbalance.

REASONS FOR GRANTING THE WRIT

The issues here presented are relatively narrow. Whether the Speech or Debate Clause of the Illinois Constitution is an expression of withholding power from the federal government under the Ninth and Tenth Amendments (District Court) or the recognition of a federal common law protection (Ct. of App.) is not of significance and pertinence. Both courts recognize the right in petitioner, and the Seventh Circuit clearly articulated the basic and pragmatic reasoning:

> "Although the speech or debate privilege embraces notions of the separation of powers among co-equal branches of government, its primary message is that legislatures must be able to discharge their lawful responsibility in an atmosphere free from the threat of interference by other governmental units. A legislator in considering whether to support or oppose a proposed law must be free to reflect on the merits; he must not be deterred from advocating a position by the threat of prosecution by a hostile executive. The evil is the fact of deterrence; whether the threat emanates from the local or national executive makes no difference." (App. 21)

We, therefore, submit the following reasons for granting the Writ.

1. The decision of the Court of Appeals herein is directly contrary to this Court's several decisions in respect of the Speech or Debate right. The Court below misconceived the nature of the right in its determination of a "waiver" of Speech or Debate security. This is not a privilege, it is a proscription. The proscription is that the legislator "shall not be questioned" (Art. I, §6, U.S. Constitution); that he "shall not be held to answer" (Art. 4, Section 12, Illinois Constitution, 1970); that "it is not

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consonant . . . for a Court to inquire" (*United States* v. *Johnson*, 383 U.S. 169 at 180, Justice Harlan concurring).

It was also stated in *Carter* v. *Carter Coal Co.*, 298 U.S. 238 that "State powers can neither be appropriated on the one hand nor abdicated on the other."

It should also be noted that in *United States* v. *Johnson*, 383 U.S. 169 and in *United States* v. *Brewster*, 408 U.S. 501, this Court emphasized that in trials the proscription went to the inquiry into legislative acts and the impropriety of evoking response, not whether by responding the law-maker had waived; quoting with approval from *Ex Parte Wason*, 4 Q.B. 573, that law-makers "cannot be inquired into" by criminal proceedings.

The Court of Appeals overlooked the fact that a grand jury subpoena is the inception of criminal proceedings. An "inquiry" at the inception is equally proscribed as an "inquiry" on trial.

2. The decision below is in conflict with decisions of this Court holding that waivers of important constitutional rights must be knowingly and intelligently made. The Seventh Circuit has found (App. 26) that a legislator who waived his privilege against self-incrimination under the Fifth Amendment of the Constitution, also waived his Speech or Debate privilege given him under the Illinois Constitution and that "we need not find a knowing and intelligent forfeiture of that right". The decision continued:

> "At all times, appellee was represented by counsel and informed of his right to refuse to answer questions by asserting his Fifth Amendment privilege against self-incrimination."
>
> "* * * he gave potentially damaging testimony rather than relying on his privilege against self-incrimination, of which he had been informed. Be-

> cause he made a conscious choice to testify, he waived the instant privilege."

We further submit to the Court that the Appellate Court erroneously presumed knowledge of both petitioner and his counsel. In its decision this Court states:

> "Although subpoenaed before the grand jury, Markert was not compelled to testify in violation of any right. See *United States* v. *Calandra*, 414 U.S. 338, 346; *Kastigar* v. *United States*, 406 U.S. 441, 448. Because he was a state legislator, knowledgeable in the workings of the Government and represented by competent counsel, his election to testify waived his Speech or Debate clause privilege." (App. 37)

We respectfully submit this is a fact determination that may not be presumed. It is emphatically denied that this presumption is based on a bare sampling of human experience, much less is it a product of unequivocal human experience such as would support the presumption.

If this Court should hold to its initial position that this is a waivable right rather than a proscription, it should remand for full hearing on appellee's knowledge of that right, as well as the advice—as well as comprehension—of his counsel at the time of making the statements in issue. Presumption of knowledge, and presumption of intelligent waiver is contrary to all authority extant.

This is especially so when the lower court did not fully explore knowledge and waiver, and never reached any issue thereon, it having been guided by its holding of absolute proscription of executive or judicial inquiry.

3. The Court of Appeals, we believe, completely misconceives this court's unexplained footnote in *Gravel* v. *United States*, 408 U.S. at 622, n.13. The way that Court describes the note is:

> "This analysis is consistent with the Supreme Court's note in *Gravel* v. *United States, supra*, 408 U.S. at 622 n. 13, that a Senator can waive his aide's

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> claim of privilege. If so, the Senator, and Markert in this case, should similarly be able to waive his own privilege. The courts have often held that evidentiary privileges may be waived by the involved individual." (App. 25)

The decision of this Court in *Gravel* cannot in any wise be taken to authorize any implied waiver. *First this Court was adamant that the legislator could not be questioned at all.* As to his aide, this Court did not contemplate any implied waiver. It said, in unmistakable terms that the insulation had first to be "repudiated."[3] Repudiation

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[3] The full text of this Court's decision in *Gravel* v. *U.S.* 408 U.S. at 622 n. 13 is as follows:

> [12-15] The United States fears the abuses that history reveals have occurred *when legislators are invested with the power to relieve others from the operation of otherwise valid civil and criminal laws.* But these abuses, it seems to us, are for the most part obviated if the privilege applicable to the aide is viewed, as it must be, as the privilege of the Senator, and invocable only by the Senator or by the aide on the Senator's behalf,[13] and if in all events the privilege available to the aide is confined to those services that would be immune legislative conduct if performed by the Senator himself. *This view places beyond the Speech or Debate Clause a variety of services characteristically performed by aides for Members of Congress,* even though within the scope of their employment. It *likewise provides no protection for criminal* conduct threatening the security of the person or property of others, *whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction.* Neither does it immunize Senator or aide from testifying at trials or grand jury proceedings involving third-party crimes where the questions do not require testimony about or impugn a legislative act. Thus our refusal to distinguish between Senator and aide in applying the Speech or Debate Clause does not mean that Rodberg is for all purposes exempt from grand jury questioning.

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[13] It follows that an aide's claim of privilege can be *repudiated* and thus waived by the Senator.

Emphasis ours.

negates any implied waiver. It imports knowledge and affirmative rejection. On the state of this record it is a travesty to suggest petitioner "repudiated" that of which he did not know, his counsel did not (at the time) know, and the government did not advise him (because it, too, did not know). The implied waiver relying on this Court's decision in *Gravel,* ignores this Court's articulation of repudiation as necessary thereto—even in the case of an aide. We are not dealing with an aide. We are dealing with an integral element of the legislature itself.

CONCLUSION

Wherefore for the above and foregoing reasons the petitioner respectfully prays this Court issue its Writ of Certiorari to the Court of Appeals for the Seventh Circuit to review the reversal of the suppression order issued by the district court.

Respectfully submitted,

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